JUL 9 1974

IN THE

Supreme Court of the United States

Term, 1974

No. 73-1975

SAMUEL G. FERRARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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SAMUEL G. FERRARO,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Samuel G. Ferraro, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this case on June 6, 1974 (Appendix "A" hereto).

Statement of No Opinion

No opinion was rendered in this case by the District Court for the Western District of Pennsylvania or by the United States Court of Appeals for the Third Circuit.

Jurisdiction

The judgment of the Court of Appeals was entered on June 6, 1974 (See Appendix "A" hereto). This petition for certiorari was filed within thirty days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statement of Questions Presented for Review

1. In an income tax prosecution, where the Government is proceeding under a specific items theory of proof based on alleged rackets payoffs, should the defendant's Motion for a Bill of Particulars requesting the names of the alleged sources of income and other details of the payoffs be granted?

2. Where the Government's primary witness in a tax prosecution against a former police official is an unindicted co-conspirator who is presently serving a ten year Federal sentence of imprisonment, is the accused entitled to:

   A. Cross-examine the witness regarding payoffs allegedly made to other police officials during the same time period;

   B. Cross-examine the witness regarding his prior false statements under oath;

   C. Examine impeaching evidence in the Government's possession which would indicate that the witness testified falsely at defendant's trial?

Constitutional and Statutory Provisions Involved

1. 26 U.S.C. § 7206(1)

§ 7206. Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter.

2. 18 U.S.C. § 1511 (See Appendix "B" hereto)

3. Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4. Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

5. Rule 7(f) of the Federal Rules of Criminal Procedure:

> (f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Statement of the Case

This case involves charges that petitioner, Samuel G. Ferraro, received rackets payoffs in connection with his duties as Chief of the Rackets Squad of the Allegheny County Detective Bureau and did not report income thereon from 1966 through 1971 in the approximate amount of $290,533. In August, 1973, petitioner was indicted in the United States District Court for the Western District of Pennsylvania. Six counts of the indictment charged that appellant wilfully and knowingly made false statements on income tax returns (understatement of income figures) for the years 1966, 1967, 1968, 1969, 1970 and 1971 in violation of 26 U.S.C. § 7206(1); one count of the indictment, under 18 U.S.C. § 1511, charged that petitioner conspired with others, including unindicted co-conspirator, Anthony Grosso, to obstruct the enforcement of the criminal laws of Pennsylvania. Your petitioner was convicted on all seven counts and was sentenced to six years imprisonment, five years probation and a fine of $30,000 plus costs.

The Government sought to meet its burden of proof as regards to the tax counts, by employing the specific items method. More particularly, the Government called several convicted gamblers, all of whom testified to making payoffs in various amounts to your petitioner.

The Government's first "specific items" witness was Charles Navish. Navish testified that he paid appellant $100 per month for protection of his numbers operation starting in late 1964 and continuing until May, 1968 (Tr. 115-121). In May, 1968, his payments increased to $500 per month and these payments continued until April, 1970, when the appellant resigned his position as a County Detective (Tr. 140). Navish further testified that for four months in 1968 he paid appellant through County Detective James Hockenberry (Tr. 122-124).

The Government's second "specific items" witness was Donald Cole, a convicted gambler serving a federal probation. Cole testified that he initially paid Samuel Ferraro $200 a month for protection for himself and his numbers writers beginning in May, 1965 (Tr. 322-325). These monthly payments, according to Cole, were periodically raised until they reached a level of $500 per month (Tr. 323, 326-331). According to Cole the last payment was made in approximately December, 1969 (Tr. 330).

The Government's main "specific items" witness was Anthony Grosso, who admitted to being the head of a $23,000,000 per year gambling operation. Grosso is presently serving a ten year federal prison sentence for gambling violations. Furthermore, at the time of appellant's trial, he was facing federal charges for obstruction of justice in connection with alleged jury tampering (Tr. 487-488, 496). Grosso testified to paying appellant $4,950 per month from the time Mr. Ferraro took over leadership of the Detective Squad in June, 1966, until he (Grosso) was arrested in July, 1971, by federal authorities (Tr. 504, 514). Grosso stated that he continued to pay Ferraro after his resignation from the County Detectives in May, 1970 because Ferraro told him he was still the "boss" (Tr. 577).

Grosso admitted to various false statements under oath on various occasions (Tr. 528). However, defense counsel, by Order of Court, was limited in cross-examining Grosso in detail as to these statements (Tr. 524). Grosso also testified as to making payoffs to other public officials during the same period of time as he claimed to pay the appellant, but the Court prohibited cross-examination as to the identities of these officials or the specifics of the payments (Tr. 585-591).

Anthony Grosso's brother, Sam Grosso, who was facing a six year federal prison sentence, testified that his brother told him to credit his $4,950 per month payments to Ferraro on the business books of the gambling operation, and this was done from 1966 through July, 1971. Sam Grosso contradicted Tony as to the date when their operation terminated by testifying that it terminated in April of 1973 (Tr. 643-644) and not in July of 1971 as brother Tony alleged (Tr. 504, 514). Tony and Sam Grosso both testified under grants of testimonial immunity.

Witnesses (James Hockenberry, Sergeant Thomas Tridico of the Pennsylvania State Police and June Bell, offered to corroborate the prosecution specific items witnesses tended to do so, but, in part, they also contradicted Government witnesses. In part, Navish was corroborated by Hockenberry, Tridico and Cole; in part, important aspects of his testimony were contradicted by these witnesses. Also, Cole contradicted Hockenberry; June Bell contradicted Cole; Sam Grosso contradicted Tony Grosso, etc.

The appellant did not testify in his own defense. The main thrust of the defense, as developed through cross-examination and testimony of defense witnesses, was that the Government's case lacked credibility. Evidence was intro-

duced that Grosso was under surveillance by the F.B.I. during part of this period and his apartment telephone was "tapped" for a short period (Tr. 719). No contacts with Ferraro were established via surveillance or telephone taps (Tr. 724, 730). Also, there was evidence that appellant hired his attorney and tax accountant in March-April, 1970, contrary to Anthony Grosso's testimony that he (Grosso) had "recommended" these individuals to Ferraro in the summer of 1970 after Ferraro had resigned from the Detectives (Tr. 512, 707-709, 838-839).

REASONS FOR GRANTING THE WRIT

1.

The decision below regarding the required scope of a Bill of Particulars in an income tax prosecution based on the specific items theory of proof raises significant and recurring problems which should be resolved by this Court.

Petitioner was tried on a superseding indictment. The original indictment had charged tax violations for the years 1966 through 1968 involving the understatement of income in the total amount of approximately $22,800 in violation of 26 U.S.C. Sec. 7206(1). After Grosso's information became available, the Government filed the instant indictment.

Because the Government had used a standard form indictment, Motion for a Bill of Particulars requesting information as to the sources, dates and other particularized information pertaining to the alleged transactions involved in this case. The Government was required to give little or no additional information. Pursuant to the Court Order, the United States Attorney informed defense counsel that the Government intended to pursue a specific items case with corroboration by bank deposits and bank

expenditures analysis. Further, the Government, pursuant to the Court's Order, informed defense counsel that the unreported income was derived from monthly rackets payoffs and provided the yearly total of same and a schedule of the appellant's ending bank balances.

Upon filing of the superseding indictment, petitioner filed another Motion for Bill of Particulars. The Trial Judge took the position that since petitioner had been denied the normal process available to a defendant in a tax case as to the new tax counts for 1969 through 1971, additional information should be provided as to those years. Thus, the Government was ordered to provide the petitioner with their theory of proof, the source of the unreported income (racket payoffs), the yearly totals of the unreported income, and a statement as to whether the source of the unreported income was different from those in the initial indictment. However, the Trial Court did not require the Government to disclose the names of witnesses who would testify as to years involved in the new indictment if they were included in the old indictment. Thus, petitioner did not get the information as to Navish, Cole and Hockenberry, who, according to the evidence made certain payments.

Clearly, the standard indictment in a tax case involving specific items gives the defendant no information as to the actual charge against him. Of course, he is informed as to the fact that there is a tax charge and the figures involved but he receives no meaningful information unless he is given the specific items. These specific items would, of necessity, be provided an accused if he were being tried on the substantive crime implicitly involved in receiving unreported rackets payoffs. To permit the Government to conceal these specifics until trial deprives a defendant of a

meaningful opportunity to prepare a defense and even to prepare an adequate examination of prospective jurors.

Therefore your petitioner requests that this Honorable Court adopt a rule of law which would make the granting of such particulars a requirement in a tax case wherein the Government proceeds on a specific items theory.

2.

The decision below pertaining to the scope of the cross-examination of the main prosecution witness is in conflict with prior decisions of this Court and various Circuit Courts.

It has long been recognized that the Sixth Amendment's confrontation clause requires a Trial Court to permit defense counsel to conduct wide-ranging and searching cross examination of key Government witnesses; *Pointer vs. Texas*, 380 U.S. 400 (1965). This right of cross examination is especially protected where defense counsel is attempting to impeach and discredit the witness' testimony. *Alford vs. United States*, 282 U.S. 687 (1931); *United States vs. Gordon*, 344 U.S. 414 (1953). Similarly, this Court has repeatedly held that the Fifth Amendment's due process clause precludes the Government from withholding evidence which may affect the credibility of Government witnesses. *Brady vs. Maryland*, 373 U.S. 83 (1963); *Giglio vs. United States*, 405 U.S. 150 (1972).

Your petitioner submits that the requirements of the above-cited cases were abrogated by certain rulings of the Trial Court which precluded or severely limited petitioner's impeachment attempts of a critical Government witness; one Anthony "Tony" Grosso, the admitted head of a $23 million a year gambling empire.

It must be emphasized that appellant's defense hinged on the lack of credibility of Government witnesses; especially Anthony "Tony" Grosso Indeed, the Government's case as to four of the seven counts of the indictment rested solely on the testimony of Anthony Grosso. Grosso was the only witness giving direct testimony as to count seven, the conspiracy to obstruct state and local law enforcement. Moreover, his testimony was essential as to counts four through six, which involved the unlawful understating of income for the years 1969, 1970 and 1971. More particularly, while Navish and Cole had testified as to payments during part of this period, their testimony as to amounts was substantially less than the amounts reported by appellant as miscellaneous income during these years. Since the Government, in its computation of understated income, gave the appellant credit for said miscellaneous income, it was necessary for the jury to believe Grosso in order for there to be any amounts of unreported income.

To impeach the credibility of Anthony Grosso, the defense proposed to proceed on three separate facts: First, defense counsel intended to cross-examine Mr. Grosso regarding payments he allegedly made to other law enforcement officers at the same time he was paying petitioner. Depending upon the answers, the disclosed officers may have been called to testify to refute Grosso. Second, the defense proposed to show that Grosso was no stranger to judicial proceedings and had testified on at least five prior occasions that he was not involved in the numbers business, and that he had a practice of testifying as to these facts in a manner convenient to himself or to his friends regardless of the truth (Tr. 466-470, 481-484). Finally, the defense intended to show that Grosso testified falsely when he stated that his numbers operations ceased when he was arrested in July of 1971.

A.

At the Government's request, the Trial Court either prohibited or greatly restricted defense counsel's inquiries into the above matters.

> "I did rule that he could ask whether he paid protection to any other agency without naming any individual, and he could designate whether it was city, county, state or federal." (Tr. 583)
>
> ". . . I'm not going to allow anybody's name to be tossed into it who won't have an opportunity to correct it . . . I will permit you to ask whether the agency concerned was the police agency of the City of Pittsburgh . . . That forecloses it." (No further inquiry) (Tr. 588)

During the course of the trial, Grosso had testified as to the mammoth scope of his numbers operation and the fact that an operation of this type could not operate without protection from law enforcement officers. Defense counsel proposed to ask Grosso who else was being paid at the same time he was allegedly paying Ferraro. The ruling of the Court precluded specific answers to the question and deprived the defense of potential supporting witnesses.

B.

Also, in response to a Government request, the defense was limited in cross-examining Grosso about prior false testimony that he had given under oath. As indicated, his direct examination had described the scope of his gambling operations. However, he testified as to activities in the indictment years, 1966 through 1971. The defense proposed to ask the defendant how long he had been in the numbers business and upon receiving the answer that he had been so engaged for approximatey 45 years, confront him with his specific prior testimony on five occasions be-

tween 1950 and 1964 wherein he denied any involvement in the numbers business.

Counsel desired to demonstrate that this consistent pattern of estimony was altered in 1966 when Grosso admitted his involvement in the numbers business in a trial involving another law enforcement officer whom he claimed to have paid, which testimony was given at a time when Grosso was under a nine year sentence in connection with his conviction on Federal gambling charges. Grosso's conviction was later reversed by the United States Supreme Court. *U. S. v. Grosso*, 390 U.S. 62 (1968) reversing 358 F.2d 154 (3rd Cir. 1966). See also *U. S. v. Maloney*, 241 F.Supp. 49 (W.D.Pa. 1965).

In response the Court ruled:

> "I (the Court) will permit you to ask whether under oath this witness testified that he was not in the numbers business on various occasions whether it was before a court and jury, or a grand jury, and without indicating parties involved in the cases or the details of the cases, and I will permit you to ask whether he had on numerous occasions indicated he had said that he was not in the operation or denied that he was in it, and a generic description of the situation, whether it was before a court and jury, nonjury, or grand jury." (Tr. 524)

The jury was told that Grosso had lied on prior occasions. They were deprived of his precise language and manner of testimony. An attack on Grosso's credibility could not be fully accomplished by merely informing the jury that the witness lied on prior occasions. It was not enough to tell the jury that Grosso lied on some occasions and told the truth on others; the jury should have had the benefit of Grosso's actual words, the circumstances, the reasons for the lies and their significance in the proceedings in which they were uttered. The fact of a lie is often not nearly as

persuasive as the actual words of the lie. *Cf. U. S. v. Hogan*, 232 F.2d 905 (3rd Cir. 1956).

C.

Not only was defense counsel precluded from effectively showing that Grosso lied under oath on prior occasions as regards of his involvement in gambling operations, but counsel was also precluded from showing that he testified falsely in the instant case when he denied any involvement in gambling operations after his arrest in July, 1971.

Grosso testified that his gambling operations terminated with his arrest in July of 1971 (Tr. 490, 498, 505, 515, 526-527); his brother, Sam, testified that the gambling enterprise continued until April, 1973 (Tr. 643). Defense counsel called F. B. I. Agent Ronald Wetherington, who, at the sentencing of the Grosso brothers in June of 1973, represented, based on information supplied by an informant, that the Grosso operation had continued until the previous day and was, to the best of his knowledge, still in operation (625-A, 638-A). The Court prohibited the mention of this point either through direct examination of Mr. Wetherington or through stipulation or by disclosing the name of the informant.

Obviously, this material was vital to the defense. The main defense issue was Grosso's state of mind or motive for testifying as he did. If he had testified falsely as to the dates of his involvements in the numbers business, the jury may well disbelieve him entirely. If his operation was continuing, even though he, himself, had been incarcerated, the jury might conclude that Grosso once again was lying to protect that operation, himself, his family, his friends and his business (Tr. 529).

Appellant respectfully submits that once this became an issue at trial, the Government had an affirmative obligation to make the requested information known to the defense and could not properly suppress such information as it did by way of its various objections and refusals to stipulate. Appellant contends that the jury was entitled to know the date when Grosso got out of the numbers business, whether it was July, 1971 or ever. If Grosso's operation continued to the date of his sentence or even through appellant's trial, this would affect his motives in testifying and the jury's evaluation of his credibility. This was particularly relevant in view of the contradiction by Samuel Grosso, a so-called "corroborating" witness. It is not contended that the Government suppressed this information from defense counsel; but by refusing to name the informant or to stipulate, the information was kept from the jury.

There can be no denying that Grosso was a critical witness for the prosecution. In view of his importance as a witness and the critical nature of the points on which defense counsel was precluded from full and total cross-examination, petitioner respectfully submits that the limitations on impeachment as described above deprived him of a fair trial and was in derogation of his rights under the Fifth and Sixth Amendments to the United States Constitution as discussed by the Court in *Brady, Giglio, Alford, & Gordon, supra.*

Conclusion

For these reasons, a Writ of Certiorari should issue to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

COOPER, SCHWARTZ, DIAMOND & REICH,
MELVIN SCHWARTZ,
SAMUEL J. REICH.
Attorneys for Petitioner.

APPENDIX A

Judgment Order of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1989

UNITED STATES OF AMERICA,

v.

SAMUEL G. FERRARO,

Appellant.

(D. C. Criminal No. 73-226.)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued May 29, 1974.

Before ROSENN and HUNTER, *Circuit Judges*, and HANNUM, *District Judge*.

Samuel J. Reich, Esquire, Mark Glosser, Esquire, Pittsburgh, Pa., Attorneys for Appellant.

Richard L. Thornburg, Esquire, United States Attorney. Thomas A. Daley, Esquire, Assistant United States Attorney, Kathleen Kelly Curtin, Esquire, Assistant United States Attorney, Pittsburgh, Pa., Attorneys for Appellee.

Appendix A—Judgment Order of the Court of Appeals

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit, that the court erred:

(1) in limiting the impeachment of witnesses;

(2) in refusing to grant a motion of acquittal on the theory of insufficiency of evidence;

(3) in various instructions to the jury;

(4) in denying appellant a reasonable bill of particulars;

(5) in excising portions of statements of witnesses subject to the Jencks Act, 18 U.S.C. § 3500; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT:

MAX ROSENN,
Circuit Judge,

ATTEST:
(Signature illegible),
Clerk.

Dated: June 6, 1974.

APPENDIX B

18 U.S.C. § 1511

§ 1511. Obstruction of State or local law enforcement

(a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if—

(1) one or more of such persons does any act to effect the object of such a conspiracy;

(2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision; and

(3) one or more of such persons conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, book making, maintaining slot machines, roulette wheels, or dice tables and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization, except as compensation for actual expenses inurred by him in the conduct of such activity.

(d) Whoever violates this section shall be punished by a fine of not more than $20,000 or imprisonment for not more than five years or both.

Certificate of Service

I hereby certify that on this ..... day of ....., 1974, five copies of the Petition for Writ of Certiorari were mailed, Postage prepaid, to the Solicitor General, United States Department of Justice, Washington, D. C. 20530. I further certify that all parties required to be served have been served.

COOPER, SCHWARTZ, DIAMOND,
& REICH,

By .....,
Melvin Schwartz,

By .....,
Samuel J. Reich.